Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
Appellees.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
Appellants,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

PETROCHEMICAL ENERGY GROUP,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

AMERICAN GAS ASSOCIATION,
Appellant,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Appellees.

UNITED STATES SENATE,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
Respondents.

APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

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** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1]In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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September 3, 1982